

file

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of Scott Hodgdon for)
a Permit to Place an Aerator on a)
Pier Located on the Bed of Lake)
Butte des Morts, Winnebago County,)
Wisconsin)

Case No. 3-LM-95-162

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Scott Hodgdon, M.D., applied to the Department of Natural Resources (Department) for a permit pursuant to §30.12, Stats., to place an aerator on the piling of a pier. The Department required Dr. Hodgdon to publish a Notice of Proposed DNR Permit which stated that unless written objection was made within thirty days of publication of the notice, the Department might issue the permit without a hearing. The Department received a timely objection from the Town Board of the Town of Oshkosh.

On August 25, 1995, the Department forwarded the file to the Division of Hearings and Appeals for hearing. Pursuant to due notice a hearing was held on October 13, 1995, before Mark J. Kaiser, Administrative Law Judge.

In accordance with §§ 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Scott Hodgdon, Applicant, by

Daniel Muza, Attorney
217 Ceape Avenue
Oshkosh, Wisconsin 54901-5061

Wisconsin Department of Natural Resources, by

Michael D. Scott, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

Town of Oshkosh, Objector, by

Gerald R. Frey, Chairperson
4804 Island View Point
Oshkosh, Wisconsin 54901-1318

FINDINGS OF FACT

1. Scott Hodgdon, M.D., owns real property located in the SW 1/4 of Section 33, Township 19 North, Range 16 East, Town of Oshkosh, Winnebago County. The above-described property abuts Lake Butte des Morts, which is navigable in fact at the site.

2. In 1990 or 1991 Dr. Hodgdon constructed a permanent boat pier and boat shelter on the bed of Lake Butte des Morts at his property. To prevent ice from damaging the pier and boat shelter a aerator was placed on a piling of the pier during December, 1993. The purpose of the aerator was to keep the water in the immediate vicinity of the pier from freezing. The aerator was removed at the end of the winter of 1993-94.

3. The aerator was reinstalled on December 9, 1994 and removed on March 17, 1995. By application dated March 16, 1995, Dr. Hodgdon, the applicant, applied for a permit pursuant to §30.12, Stats., for the aerator. The applicant and the Department of Natural Resources (Department) have fulfilled all procedural requirements of §30.02, Stats.

4. Use of the aerator installed during the winter of 1993-1994 was a self-described "disaster." The aerator inhibited the formation of ice along the entire frontage of the property of the applicant and along the shoreline west of the applicant's property. The area of open water included a public boat ramp which is used by ice fishermen and snowmobilers to gain access to Lake Butte des Morts. The aerator made use of the boat ramp unsafe.

5. The aerator originally installed in December, 1993, had a 3/4 horsepower pump. This aerator was subsequently replaced with one with a 1/2 horsepower pump. Using a smaller pump and redirecting the flow of the water pumped by the aerator eliminated the open water problem at the boat ramp during the winter of 1994-1995.

6. The aerator will not materially impair navigation if it is installed and maintained in compliance with the conditions set forth in the permit.

7. The aerator will not be detrimental to the public interest if it is installed and maintained in compliance with the conditions set forth in the permit.

8. The Department has complied with the procedural requirements of §1.11, Stats., and Ch. NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of §30.12, Stats.
2. The proposed aerator constitutes a structure within the meaning of §30.12, Stats.
3. The Division of Hearings and Appeals has authority pursuant to §§30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the installation and maintenance of an aerator subject to the conditions specified.
4. The project is a type III action under §NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under §30.12, Stats., for the installation of an aerator subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the aerator becomes a material obstruction to navigation or becomes detrimental to the public interest.
2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the installation or operation of the aerator.
3. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
4. The aerator shall be installed and operated in a manner which will not adversely affect the formation of ice at the boat landing.
5. The permittee shall comply with the warning requirements set forth at §167.26, Stats.
6. Acceptance of this permit shall be deemed acceptance of all conditions herein.

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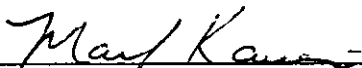
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This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on November 24, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By



MARK J. KAISER

ADMINISTRATIVE LAW JUDGE

ORDERS\HODGDSCO MJK

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.